No. 80-263

In The

Supreme Court of the United States

OCTOBER TERM, 1980

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and ITHACA COLLEGE,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT ITHACA COLLEGE'S BRIEF IN OPPOSITION

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NATIONAL LABOR RELATIONS BOARD and ITHACA COLLEGE,
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On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENT ITHACA COLLEGE'S BRIEF IN OPPOSITION

Respondent Ithaca College respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's decision.

OPINIONS BELOW

The opinion of the Second Circuit is not yet offically reported. A copy of the opinion is appended to the petition as Appendix A.

A copy of the underlying decision and order of the National Labor Relations Board, 244 N.L.R.B. No. 54 (1979), is appended to the petition as Appendix B.

JURISDICTION

The judgment of the Second Circuit was entered on May 18, 1980. The petition states that jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. WHETHER THIS CASE WARRANTS THE EXERCISE OF THE COURT'S DISCRETIONARY JURISDICTION.

II. WHETHER THE SECOND CIRCUIT PROPERLY DENIED ENFORCEMENT OF THE NATIONAL LABOR RELATIONS BOARD'S BARGAINING ORDER.

III. WHETHER THE SECOND CIRCUIT PROPERLY DENIED REVIEW OF THE NATIONAL LABOR RELATIONS BOARD'S REFUSAL TO AWARD ATTORNEYS' FEES.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pages 1-5 of the petition.

REGULATIONS INVOLVED

Section 102.65(e)(1) of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. § 102.65(e)(1) (1979), states in relevant part:

> A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision for a reconsideration or rehearing ....

STATEMENT OF THE CASE

I. *Nature of the Case*

Petitioner, Ithaca College Faculty Association ("ICFA"), seeks to have this Court invoke its discretionary jurisdiction to review the decision of the Second Circuit denying enforcement of the National Labor Relations Board's ("NLRB" or "Board") order dated August 22, 1979, directing Ithaca College ("College") to negotiate with ICFA as the exclusive representative of the full-time faculty of the College. Petitioner also seeks review of the Second Circuit's enforcement of the NLRB's order denying attorneys' fees to ICFA.

The underlying representation proceedings in this case were commenced before the Second Circuit's decision in, and this Court's affirmance of, *NLRB v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978), *aff'd*, ____U.S.____, 100 S. Ct. 856 (1980). This case presents no questions concerning the substantive law articulated by this Court, or the Second Circuit, in the *Yeshiva* decisions. Rather, this case deals only with procedural issues that have arisen because the parties were in the midst of a representation proceeding when *Yeshiva* was decided by the Second Circuit.

II. *Statement of Facts*

In December, 1977, the American Association of University Professors Chapter of Ithaca College ("AAUP") filed a representation petition with the Board's Regional Director for the Third Region ("Regional Director") seeking recognition as the exclusive bargaining representative of the College's faculty. The Regional Director scheduled a unit determination hearing for January, 1978. ICFA intervened in that hearing, thereby becoming a party to the representation proceeding.

The Regional Director found that the appropriate unit for collective bargaining consisted of "all full-time faculty members employed by Ithaca College at its Ithaca, New York location but

excluding all . . . part-time faculty, and supervisors as defined by the Act." The Regional Director's Decision and Direction of Election, dated February 3, 1978, directed that an election be held. (Appendix C).[1]

By later stipulation among all parties, and with the approval of the Regional Director, the unit description was amended to include several inadvertently omitted full-time faculty members of the College located at the Albert Einstein Medical Center in New York City.[2] (Appendix 1).

In the election held on March 3, 1978, none of the voters' three choices (AAUP, ICFA, and "Neither Union") received a majority of the vote, and, following the resolution of various challenges and objections, a run-off election was scheduled for September 29, 1978 between the top two choices in the March election — ICFA and "No Union."

On July 31, 1978, well in advance of the run-off election date, the Second Circuit issued its decision in *NLRB v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978). The Second Circuit held that the "rigid criteria" applied by the Board in determining whether full-time faculty members at private colleges and universities were "employees" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("the Act"), were "arbitrary," "unjustified," and inconsistent with the Act.

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[1]Lettered appendices are attached to the petition; numbered appendices are attached to this brief in opposition.

[2]ICFA attempts to characterize the stipulation as something more than a formal device by which the inadvertent exclusion of full-time faculty members employed at the Albert Einstein Medical Center was rectified. (Petition, at 17, 20). This attempt to mislead the Court is highly inappropriate. As the Board indicated in related correspondence, the stipulation merely amended the unit determination by including the full-time faculty members employed in New York City. (Appendix 1).

The Second Circuit's rejection of the Board's routinely applied precedent afforded the College its first meaningful opportunity to have the Board consider the managerial status of its full-time faculty. On August 24, 1978, the College petitioned the Regional Director in accordance with the Board's Rules and Regulations, 29 C.F.R. § 102.65(e)(1) (1979), for a hearing in which the principles established in *Yeshiva* would be applied to the College faculty. (Appendix 2).

Within twenty-four hours, the Regional Director rejected the College's petition, stating in relevant part:

> Your motion is denied. The Board may decide to petition the United States Supreme Court for a writ of certiorari to review the Second Circuit's decision in *Yeshiva. In any case, whether the Board seeks review of this decision, or not. Regional Directors are bound to follow and apply Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce in the decision of the Court of Appeals. For these reasons your motion is denied.*

(Appendix 2, at 2-11) (emphasis supplied). The College's request for review of the Regional Director's determination, (Appendix 2, at 2-12), was denied by the Board on September 26, 1978, on the basis that it raised no "substantial issues warranting review." (Appendix 2, at 2-24).

While the request for review of the Regional Director's determination was pending before the Board, the College sought a temporary restraining order to postpone the run-off election pending a redetermination of the appropriateness of the unit under *Yeshiva* principles. For jurisdictional reasons unrelated to the College's *Yeshiva* claim, the request was denied by the United States District Court for the Northern District of New York, as was the College's application for an injunction pending an appeal to the Second Circuit. *Ithaca College v. Thomas W. Seeler, Regional Director, NLRB,* No. 78-CV-485 (N.D.N.Y. Sept.

26, 1978), *motion for stay pending appeal denied*, No. 78-6150 (2d Cir. Sept. 28, 1978).

In a further attempt to secure recognition of its *Yeshiva* claim, the College, on September 15, 1978, notified the Regional Director that it was withdrawing the voter eligibility (*Excelsior*) list. (Appendix 3). The withdrawal was not honored by the Regional Director.

The run-off election was held, as scheduled, on September 29, 1978; ICFA received 116 votes, "No-Union" 109 votes. The College had, based on *Yeshiva*, filed a timely challenge to the eligibility of each voter, but the Board agent conducting the election summarily rejected the challenges. (Appendix 4). The College then filed objections to the election, reasserting its *Yeshiva* claim.[3]

On November 8, 1978, the Regional Director issued a Report on Objections and Challenges, in which he stated that the College's *Yeshiva*-related contentions had been passed upon and rejected in the Board's September 26, 1978 denial of review of the Regional Director's decision rejecting the petition for reconsideration. Thereafter, the College timely filed exceptions to the Regional Director's Report with the Board. (Appendix 5).

A three-member panel of the Board adopted the Regional Director's ultimate findings and recommendations, but expressly rejected the portion of the Report that indicated that the Board had already resolved the College's *Yeshiva*-related claims. The Board reiterated that its September 26, 1978 order merely denied rehearing on the "usual grounds" that the motion raised no substantial issues warranting review. The College's motion for reconsideration of the Board's affirmance of the Report was denied on February 22, 1979.

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[3]The College urged several other grounds for voiding the election, which the Second Circuit did not have to pass upon in view of the disposition of the College's *Yeshiva* claims.

In a final administrative attempt to obtain review of its *Yeshiva* claim, the College refused to bargain with ICFA, which was the only procedural avenue remaining open to the College. Accordingly, ICFA filed an unfair labor practice charge on February 23, 1979 accusing the College of an unlawful refusal to bargain. A complaint and notice of hearing were issued by the Regional Director on March 29, 1979. In its answer to the complaint, the College asserted three affirmative defenses, including its defense that, based on *Yeshiva*, the managerial or supervisory status of its full-time faculty members precluded their being subject to the jurisdiction of the Board.[4] The College urged, therefore, that the Board certification of the unit for collective bargaining was without legal effect.

The Board's General Counsel made a motion to transfer the proceedings to the Board, to strike the College's affirmative defenses, and for summary judgment and issuance of the Board's decision and order. ICFA simultaneously moved the Board for extraordinary relief in the form of attorneys' fees.

By Decision and Order dated August 22, 1979, the Board granted the General Counsel's motion for summary judgment. As to the College's *Yeshiva* defense, the Board chronicled the College's attempts to obtain review of its *Yeshiva* claims at the representation stage and reaffirmed its view that it did not acquiesce in, or recognize as controlling, the Second Circuit's *Yeshiva* decision. (Appendix B, at B-5 & n.3). Having precluded litigation of the College's *Yeshiva* claims in the representation stage, the Board then invoked the so-called "no-relitigation" rule of *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941),[5] to

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[4]Only the College's *Yeshiva* defense is relevant on this petition for certiorari.

[5]*Pittsburgh Plate Glass*, read together with Board Rule and Regulation § 102.67(f), 29 C.F.R. § 102.67(f) (1979), prohibits relitigation, in an unfair labor practice proceeding, of issues that were or could have been litigated at the representation stage of the proceedings.

preclude consideration of the *Yeshiva* claims at the unfair labor practice stage. (Appendix B, at B-5 & n.4).

In the Decision and Order of August 22, 1979, the Board also rejected ICFA's request for attorneys' fees, finding that the College's *Yesiva* defenses were not "patently frivolous." (Appendix B, at B-6 n.5).

On August 23, 1979, the College petitioned the Second Circuit for review of the Board's bargaining order pursuant to section 10(f) of the Act, 29 U.S.C. § 160(f), and, on September 17, 1979, ICFA petitioned the Second Circuit for review of the Board's order denying attorneys' fees. The Board made a cross-application for enforcement of its orders.

Two days before the scheduled oral argument on the petitions and the cross-application, this Court affirmed the Second Circuit's decision in *Yeshiva. NLRB v. Yeshiva University,* ____U.S.____, 100 S. Ct. 856 (1980). During oral argument, the Second Circuit requested that the parties submit supplemental briefs addressing the subject of the appropriate remedy. In light of this Court's affirmance in *Yeshiva,* the Board requested a remand, but ICFA adhered to its position that the Board order to bargain should be enforced.

On May 19, 1980, the Second Circuit handed down its decision declining enforcement of the Board's order that the College bargain with ICFA and affirming that portion of the Board's decision denying ICFA's request for attorneys' fees. As to the order to bargain, the Second Circuit held that the Board had acted arbitrarily in refusing the College's petition for reconsideration in light of *Yeshiva,* thereby invalidating the underlying unit determination and certification of ICFA as the exclusive bargaining representative of the College's full-time faculty. Given the impact of the Board's conduct on the College, and having considered the parties' positions as to the appropriate remedy, the Second Circuit declined to remand the case to the Board. The Court made clear that its determination was without prejudice to the right of ICFA, or any other labor

organization, to file a representation petition with the Regional Director.

On August 19, 1980, ICFA filed its petition for a writ of certiorari with this Court seeking review of the Second Circuit's decision. On September 5, 1980, ICFA filed a new representation petition with the Regional Director, seeking once again to become the exclusive representative of the faculty members of the College. The new petition is being held in abeyance by the Regional Director pending the disposition of this petition for a writ of certiorari. (Appendix 6).

REASONS FOR DENYING THE WRIT

POINT I

THIS CASE DOES NOT WARRANT THE EXERCISE OF THE COURT'S DISCRETIONARY JURISDICTION.

The substantive rule of law articulated by this Court in *NLRB v. Yeshiva University*, ____U.S.____, 100 S. Ct. 856 (1980), is not at issue in this case. Rather, by its petition for a writ of certiorari, ICFA seeks the exercise of this Court's discretionary jurisdiction to review issues related to the procedural side-effects of the significant change in law, which the *Yeshiva* decisions of the Second Circuit and this Court represent. These issues are relevant to a limited number of private colleges and universities and are lacking in the widespread significance that would warrant the exercise of certiorari jurisdiction.

When this Court decided *Yeshiva*, a number of private colleges and universities were at one of the various stages of the Board's representation proceedings,[6] thereby creating a transition class of colleges or universities that might seek Board review of

[6]In response to the College's inquiries, the Board and its thirty-three regional offices have reported that 18 such cases exist. The August 25, 1980 Chronicle of Higher Education reports that approximately 30 post-*Yeshiva* cases are currently pending. Chronicle of Higher Education, Aug. 25, 1980, at 7, col. 2.

faculty status in light of the new principles established in *Yeshiva*. The specific legal question presented to, and resolved by, the Second Circuit in this case, however, is not common to, and does not have significance for, the entire transition class. Rather, it has significance only for a very limited sub-group of private colleges and universities within this transition class that was confronted with an earlier transition period when the Second Circuit changed the law with its *Yeshiva* decision.

Because *Yeshiva* was the controlling law of the Second Circuit before this Court's affirmance, there arose a legal question as to the applicability of the Second Circuit's decision to private colleges and universities within the jurisdiction of the Second Circuit that were in the midst of the Board's representation process when the law of the Second Circuit changed: how must the Board dispose of requests for reconsideration of faculty status, where the requests were premised on the *Yeshiva* decision of the Second Circuit.

The essential factor distinguishing the sub-group from the overall transition class is that, in dealing with members of the sub-group, the Board was constrained by the law of *Yeshiva* in the Second Circuit. The issues presented to this Court for review have significance only for those colleges and universities that could have availed themselves of the law of the Second Circuit as a basis for their request to the Board for reconsideration, *i.e.*, only the members of the sub-group of the already narrow transition class.[7]

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[7]The College is aware of only one case, other than its own, which might fall within this sub-group of transition cases. A representation hearing was held in the Daemen College case after the Second Circuit's decision in *Yeshiva*. The college adduced *Yeshiva*-type evidence and urged that all of its faculty members were excluded from coverage of the Act as managerial or supervisory employees. The Regional Director for the Third Region refused to abide by the *Yeshiva* decision. *Daemen College, Decision and Direction of Election*, 3-RC-7530 (August 24, 1979). The union prevailed in the election and the college refused to bargain. On the General Counsel's motion for summary judgment on the unfair labor practice charge, the case was transferred to the Board where it is now pending.

ICFA attempts to portray the issues presented by this case as having significance beyond the sub-group and as being of widespread public importance. Contrary to ICFA's assertions, however, this case does not raise questions concerning proper application of the substantial evidence test, nor does it raise questions concerning the "no-relitigation" rule of *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146 (1941). The Second Circuit has not deviated from established precedent of this Court on these issues. In fact, the Second Circuit was not called upon to consider either of these issues.[8] Rather, the Second Circuit was faced with the legal question of whether the Board properly refused consideration of the College's *Yeshiva* claims.

Because the issues presented to this Court are peculiar to, and do not transcend, the narrow sub-group, they are not of such widespread importance that it is "in the public interest to have them decided by this Court of last resort." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). With one possible exception of which the College is aware,[9] the resolution of the issues presented by the petition are of importance only to the parties to this litigation. As this Court has stated, it is important that a writ of certiorari not issue "except in cases involving principles, the settlement of which is of importance to the public, as distinguished from the parties ...." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1922).

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[8]See Point II, A, 1, *infra*.

[9]See footnote 7.

POINT II

THE SECOND CIRCUIT PROPERLY DENIED ENFORCEMENT OF THE BOARD'S ORDER TO BARGAIN.

A. *The Second Circuit Properly Refused Enforcement of the NLRB's Order to Bargain Because the Board Arbitrarily and Capriciously Refused to Follow the Controlling Law of the Second Circuit.*

1. *There Was No Substantial Evidence Question Before the Second Circuit.*

The Second Circuit refused to enforce the Board's order to bargain because it found the Board's refusal to grant reconsideration in light of *Yeshiva* to be arbitrary and capricious. (Appendix A, at A-10). Petitioner urges that the finding of an arbitrary and capricious refusal to conduct a hearing was made in derogation of the substantial evidence test of *Universal Camera v. NLRB*, 340 U.S. 474 (1951). (Petition, at 16).

Petitioner reasons that the NLRB found, pursuant to the "no-relitigation" rule of *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146 (1941), that the College waived its right to litigate its *Yeshiva* claims *at the unfair labor practice proceeding*. (Petition, at 18-19). Based on that Board finding, Petitioner asserts that substantial evidence on the record bound the Second Circuit to conclude that the Board relied on an untimeliness theory in refusing to conduct a hearing at the *representation stage* of this case. (Petition, at 19). Accordingly, Petitioner argues that the rule of *Universal Camera* has been breached by the Second Circuit.

Petitioner's argument is misguided in that it ignores the distinction between the Board's reasons for refusing consideration of the College's *Yeshiva* claims at the representation stage and the Board's reasons for denying consideration at the unfair labor practice stage.

During the representation stage, the College took every conceivable step to obtain consideration of its *Yeshiva* claims. It petitioned for reconsideration of the unit determination shortly after the Second Circuit's *Yeshiva* decision, sought a temporary restraining order, attempted to withdraw the voter eligibility list, challenged each voter at the run-off election, and filed objections to the election. The College was rebuked by the Board at each step. It was only after the Board refused to allow consideration of the College's *Yeshiva* claims at any and all available junctures in the representation process that the College resorted to a technical refusal to bargain in order to obtain judicial review of its claims.

In the unfair labor practice proceedings, the NLRB again refused to consider the *Yeshiva* claim. The Board held that, since the issue could have been litigated in the prior representation proceeding, the College was, pursuant to the rule of *Pittsburgh Plate Glass, supra,* barred from relitigating it at the unfair labor practice stage.[10] (Appendix B, at B-5, B-6).

Contrary to Petitioner's assertions, the *Pittsburgh Plate Glass* rule was wholly irrelevant to the Second Circuit's resolution of this case. The issue for the Second Circuit was the reason for, and the propriety of, the Board's refusal to consider the College's *Yeshiva* claims at the representation stage. The Second Circuit held that the denial of the request for reconsideration of the College's *Yeshiva* claims during the representation stage was based on the Board's refusal to acquiesce in the law of the Second Circuit, and that such a denial constituted arbitrary and capricious Board action. (Appendix A, at A-10). Only by virtue of the improper denial of reconsideration at the representation stage was the College placed in the position of not having litigated the *Yeshiva* issue when the question was raised in the unfair labor practice proceedings. Accordingly, the

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[10]The Board also cited sections 102.67(f) and 102.69(c) of its Rules and Regulations.

rule of *Pittsburgh Plate Glass* has no bearing on the issues presented for review.

The Second Circuit was not, therefore, faced with a substantial evidence question, but with the legal question of determining the propriety of the Board's reasons for denying the petition for reconsideration.

2. *The Second Circuit Properly Rejected the Board's Post-Hoc Rationalizations and Held that Denial of Reconsideration was Based on Nonacquiescence in the Law of the Second Circuit.*

In assessing the legal question of the Board's reasons for denying the College's petition for reconsideration, the Second Circuit was confronted with the Board's after-the-fact assertion that the denial was based on the untimeliness of the College's request. The court held, in essence, that this post-hoc rationalization was not supported by the reasons advanced for the denial at the time the denial was made.[11] (Appendix A, at A-7). The court found instead that the Board arbitrarily and capriciously based denial on the "notion that 'Regional Directors are bound to follow and apply Board rather than Court precedent . . . .' " (Appendix A, at A-7).

It is beyond dispute that the Second Circuit's conclusions were correct. The Regional Director clearly and unequivocally stated the basis for his refusal to consider the College's *Yeshiva* claims in denying the College's August 24, 1978 petition for reconsideration:

> The Board may decide to petition the United States Supreme Court for a writ of certiorari to review the Second Circuit's decision in *Yeshiva*. In any case, whether

[11]The Second Circuit intimated that, had the Board truly relied on timeliness at the representation stage, its action would have been set aside nonetheless. "The history of the proceedings shows that the College was assiduous in its efforts to raise a *Yeshiva* claim." (Appendix A, at A-7).

> the Board seeks review of this decision, or not, Regional Directors are bound to follow and apply Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce in the decision of the Court of Appeals. *For these reasons your motion is denied.*

(Appendix 2, at 2-11) (emphasis supplied). In its September 26, 1978, denial of the College's request for review of the Regional Director's determination, the Board approved the basis for denial, finding that there existed no substantial issues warranting review. (Appendix 2, at 2-24).

At no time in advance of review before the Second Circuit did the Board indicate, expressly or otherwise, that the College's request for consideration of its *Yeshiva* claims during the representation stage had been denied because the request was made in an untimely fashion. In fact, in its decision finding that the College had violated section 8(a)(5) of the Act, the Board confirmed that denial of consideration was based on its nonacquiescence policy:

> In support of its motion for rehearing and attempted withdrawal of the *Excelsior* list, the College relied on the Second Circuit Court of Appeals' ruling in *N.L.R.B. v. Yeshiva University.* With all due respect to the view expressed by the Second Circuit in *Yeshiva* . . . we shall adhere to our position until the Supreme Court has passed on the matter. [citations omitted].

(Appendix B, at B-5 n.3).

The Second Circuit acted properly in examining the Board's stated reasons for its refusal to grant consideration of the *Yeshiva* claims and in rejecting the Board counsel's post-hoc assertion that denial was based on the alleged untimeliness of the request. This Court has recently reaffirmed the longstanding principle of review of Board action that a court will not "substitute counsel's post-hoc rationale for the reasoning supplied by the Board itself." *NLRB v. Yeshiva University,* ____U.S.____,

100 S. Ct. 856, 864 n.22 (1980) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

In fact, the Board's position before the Second Circuit belied the claim that its refusal to grant consideration of the College's *Yeshiva* claims was based on any alleged untimeliness. As the Second Circuit stated, the Board's request for a remand of the case, which was made after this Court's affirmance of *Yeshiva*, was inconsistent with the untimeliness rationale:

> [I]f there truly was a procedural hurdle that prevented the hearing [of the College's *Yeshiva* claims], the fact that the Supreme Court affirmed in *Yeshiva* should not have made any difference, and yet the Board is now willing to conduct a hearing.[12]

(Appendix A, at A-7).

3. *The Second Circuit Properly Held that the Board's Adherence to its Nonacquiescence Policy was an Arbitrary and Capricious Basis for Refusing Reconsideration.*

Having found that the Board refused the College's petition for reconsideration on the basis of its nonacquiescence policy, the Second Circuit held that the refusal constituted arbitrary, capricious, and improper Board action, which invalidated the finding of an unfair labor practice, as well as the underlying unit determination. (Appendix A). The Board's action was set aside because it was premised on the belief that the Board was not

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[12]Incredibly, Petitioner quotes this passage from the Second Circuit's decision in support of its argument that the Second Circuit ignored the Board's "factual finding" of a waiver and in support of Petitioner's contention that the Board's nonacquiescence policy has "nothing to do with the instant case." (Petition, at 19-20). Respondent respectfully submits that Petitioner has grossly misapprehended the plain meaning of the Second Circuit's discussion of the Board's attempt to advance the timeliness theory as a justification for its actions.

bound to follow the law of the circuit in which it sought enforcement of its order. (Appendix A, at A-9).

The Board's nonacquiescence policy conflicts with fundamental principles of judicial review of agency action. Simply stated, "an agency is bound to follow the law of the Circuit." (Appendix A, at A-9). " 'Thus, a disagreement by the NLRB with a decision of [a court of appeals] is simply an academic exercise that possesses no authoritative effect.... For the Board to predicate an order on its disagreement with [the] court's interpretation of a statute is for it to operate outside the law.' " (Appendix A, at A-10 (quoting *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 969-70 (3d Cir.1979)).

The Second Circuit's rejection of the Board's nonacquiescence policy was essential "if the rule of law is to prevail," and it comports with the treatment given to the policy by other courts of appeals. (Appendix A, at A-9); *see Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979); *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979); *NLRB v. Wilson Freight*, 604 F.2d 712 (1st Cir. 1979), *cert. denied*, ____U.S.____, 100 S. Ct. 1650 (1980); *Sun Oil Co. v. NLRB*, 576 F.2d 553 (3d Cir. 1978); *Coletti's Furniture, Inc. v. NLRB*, 550 F.2d 1292 (1st Cir. 1977); *NLRB v. Gibson Products Co.*, 494 F.2d 762 (5th Cir. 1974).

B. *Even if the Board Had Refused Reconsideration on an Untimeliness Theory, the Intervening* Yeshiva *Decisions Constituted an "Extraordinary Circumstance" Excusing Any Possible Waiver.*

The Board's after-the-fact assertion that the College's request for reconsideration was denied as untimely was properly rejected by the Second Circuit.[13] Even if the Board had rejected the College's requests as untimely, however, a proper application of the law would have required the Second Circuit to deny enforcement of the Board's order.

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[13]See Point II, A, 2, *supra*.

In its petition for reconsideration of the Regional Director's unit determination, which was made pursuant to section 102.65(e)(1) of the Board's Rules and Regulations, 29 C.F.R. § 102.65(e)(1) (1979), the College alleged the existence of "extraordinary circumstances" that would warrant reconsideration. (Appendix 2, at 2-7, 2-13). The College argued that the Second Circuit's *Yeshiva* decision constituted an "extraordinary circumstance" in that it reversed the longstanding precedent of the Board that faculty members were "employees" within the meaning of the Act, *see Northeastern University*, 218 N.L.R.B. 247 (1975); *University of Miami*, 213 N.L.R.B. 634 (1974); *Fordham University*, 193 N.L.R.B. 134 (1971); *C.W. Post Center of Long Island University*, 189 N.L.R.B. 904 (1971), and afforded the College its first meaningful opportunity to have considered evidence establishing the managerial status of full-time faculty members. (Appendix 2, at 2-7, 2-13).

If the request for rehearing had been denied as "untimely," the Board would have to have ruled on the "extraordinary circumstance" provision of section 102.65(e)(1). Indeed, if the Board had sought to justify "untimeliness" as the basis for denial, it would have been required to establish that the change in the law, which *Yeshiva* represents, did not constitute an "extraordinary circumstance."

Section 102.65(e)(1) of the Board's Rules and Regulations does not define the phrase "extraordinary circumstance," yet, decisional law interpreting a similar use of the phrase in section 10(e) of the Act, 29 U.S.C. § 160(e), makes clear that a reversal of longstanding Board precedent is within the meaning of the phrase.

Section 10(e) provides that "[n]o objection that has not been urged before the Board shall be considered by the [Court of Appeals] unless the failure ... to urge such objection shall be excused because of extraordinary circumstances ...." 29 U.S.C. § 160(e). In *NLRB v. Lundy Manufacturing Corp.*, 286 F.2d 424 (2d Cir. 1960), the Second Circuit reviewed a Board finding that

the employer had committed an unfair labor practice. The Board's finding was premised on the law as stated in an earlier Board decision in *Bryan Manufacturing*, 119 N.L.R.B. 502, *enf'd*, 264 F.2d 575 (D.C. Cir. 1965). After the unfair labor practice proceeding in *Lundy*, but before Second Circuit review, *Bryan Manufacturing* was reversed by this Court *sub nom. Local Lodge No. 1424, IAM v. NLRB*, 362 U.S. 411 (1960), thereby changing the prevailing precedent that had governed the proceedings before the Board.

Before the Second Circuit in *Lundy*, the employer urged, for the first time, the change in law as a basis for denying enforcement of the Board's order. The Board argued that, under section 10(e), the employer's failure to question *Bryan Manufacturing* before the Board precluded the employer from raising the issue before the Second Circuit. In rejecting the Board's argument, Judge Friendly stated:

> [I]t is not fatal that Respondent did not include among its arguments a specific criticism, necessarily futile at that stage, of a pertinent Board decision which had been enforced by a Court of Appeals .... [Because of the intervening reversal] ... the case would surely be one where "the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." [citations omitted]

286 F.2d at 426.

In the case at hand, the dramatic reversal of longstanding Board precedent, which this Court's and the Second Circuit's *Yeshiva* decisions represent, likewise compels the conclusion that an "extraordinary circumstance" warranting reconsideration pursuant to section 102.65(e)(1) existed.[14]

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[14] In *Stephens Institute v. NLRB*, 620 F.2d 720, 727 (9th Cir. 1980), *petition for writ of cert. pending*, No. 80-307, the employer argued that this Court's *Yeshiva* decision constituted an "extraordinary circumstance" excusing the Institute's failure to raise the issue of managerial status before the Board.

Footnote continued on next page—

The decision of the Third Circuit in *NLRB v. Beck Engraving Co.* 522 F.2d 475 (3d Cir. 1975), reaffirms the *Lundy* holding that a change in pre-existing decisional law constitutes an "extraordinary circumstance." In *Beck,* which is factually more analogous to the case at hand than is *Lundy,* the employer petitioned the Board for reconsideration of an unfair labor practice decision. The basis for the employer's request for reconsideration was the intervening change in the law of two circuit courts of appeals with regard to the "impasse doctrine." 522 F.2d at 479 n.8. The Board denied the employer's request.

The Third Circuit, after holding that the request for reconsideration properly placed the impasse issue before the Board and precluded the finding of a section 10(e) waiver, held that the Board improperly denied the request for reconsideration. 522 F.2d at 479 n.8. The court found that the changes in the decisional law constituted circumstances excusing the failure to

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—*Footnote continued from preceding page*

Inexplicably, the Ninth Circuit stated that, ordinarily, pronouncements of the United States Supreme Court would constitute "extraordinary circumstances" excusing a section 10(e) waiver, but that *Yeshiva* was not such a case. The court then proceeded to examine the available evidence and concluded that Stephens Institute was not a "mature" university whose faculty had a "policy making role." 620 F.2d at 727. It is anomalous that the Ninth Circuit first held that the section 10(e) waiver was not excused and then immediately proceeded to resolve the very issues that could only be reached in the enforcement stage if the waiver had been excused. If the Ninth Circuit had truly intended to find that the *Yeshiva* decision was not an "extraordinary circumstance," it would never have evaluated the evidence as to managerial status (which evidence was, apparently, submitted to the court in the supplemental documentation referred to in the opinion). Respondent can only conclude that the Ninth Circuit mistakenly stated that *Yeshiva* did not constitute an "extraordinary circumstance," intending instead to conclude that the existence of this extraordinary circumstance did not work to the Institute's benefit because the faculty did not meet the prerequisites of managerial status and because the Institute was not akin to the type of institution of higher learning that Yeshiva University represents.

raise the impasse doctrine in the initial unfair labor practice proceeding.

Beck is factually more analogous to the present case because, unlike *Lundy*, the court was construing the phrase "extraordinary circumstances" as found in the Board's Rules and Regulations governing the grounds for reconsideration rather than as found in section 10(e). The *Beck* motion for reconsideration was made pursuant to section 102.48(d)(1), which deals with requests for rehearing in unfair labor practice cases. The College's request for reconsideration was made pursuant to section 102.65(e)(1), which deals with requests for reconsideration in representation proceedings. Both sections of the Board's Rules and Regulations provide that reconsideration is appropriate where the request is made "because of extraordinary circumstances."

The analogy to the *Lundy* treatment of the section 10(e) "extraordinary circumstances" exception to the waiver rule is apt; the analogy to the *Beck* court's holding under a similar provision of the Board's own Rules and Regulations is compelling.

The change in law that the *Yeshiva* decisions of this Court and the Second Circuit represent is an "extraordinary circumstance" within the meaning of section 102.65(e)(1). Accordingly, had the Board actually relied on an untimeliness theory in rejecting the College's petition for reconsideration, its refusal would have been arbitrary and capricious because the untimeliness would have been excused given the existence of an extraordinary circumstance. In that event, the Board's order would not have been enforced by the Second Circuit.

C. *The Second Circuit's Refusal to Enforce the Board's Bargaining Order Was the Appropriate Remedy Given the Facts and Circumstances of This Case.*

Based on the waiver theory advanced in its petition, ICFA argues that certiorari should be granted to review the Second Circuit's denial of enforcement of the Board's bargaining order.[15] It appears, although it is less than clear, that in the alternative Petitioner seeks a grant of certiorari to review the appropriateness of the Second Circuit's remedy. Petitioner seems to be arguing that, if the Second Circuit properly found that the Board acted arbitrarily and capriciously, the court should have remanded the case to the Board for reconsideration in light of *Yeshiva* rather than simply deny enforcement of the order.[16]

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[15]In light of this Court's remand of *Trustees of Boston University v. NLRB*, ____U.S.____, 48 U.S.L.W. 3568 (March 4, 1980), it is anomalous for ICFA to urge that the Board order be enforced. In *Boston University*, this Court vacated the First Circuit's enforcement of the Board's bargaining order and directed reconsideration in light of *Yeshiva*. The holding in *Boston University* established that the underlying unit determination could not stand given the change in law that *Yeshiva* represents. This reasoning applies with equal force in the case at hand. If the unit determination is invalid, the Board's order requiring the College to bargain with ICFA is unenforceable.

[16]Petitioner's request for a remand is extremely ambiguous. First, a request for relief in the nature of remand is not appropriately advanced in a petition for a writ of certiorari. Clearly, at this stage in the proceeding, Petitioner should be addressing the question of whether there exist issues warranting the exercise of certiorari jurisdiction. Second, given the form of the discussion of the remand issue, Respondent cannot ascertain whether Petitioner intended to take the position that, if its waiver theory is not deemed worthy of review, the appropriateness of the remedy issue nevertheless is, or whether Petitioner's intent was to assert that a remand would be warranted to augment the record as to the existence of an NLRB finding of waiver. The latter position would contradict Petitioner's assertion that there exists substantial record evidence supporting the Board's reliance on waiver, while the former position would be wholly inconsistent with Petitioner's position before this Court and the Second Circuit that *Yeshiva* is irrelevant to this case and that reconsideration in light of *Yeshiva* would,

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The College respectfully submits that the Second Circuit's refusal to grant remand was not an abuse of the court's discretion and that this Court should not grant certiorari to review the choice of remedy where there has been no abuse of discretion. *See NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 30 (1943).

Congress vested in the courts of appeals broad remedial powers for reviewing orders of the NLRB. On a petition by the Board to enforce an order, or on a petition by an aggrieved party for review of a Board order, the court is empowered to "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board . . . ." 29 U.S.C. § 160(e), (f). It has long been settled that

> [t]*he jurisdiction to review the orders of the . . . Board is vested in a court with equity powers*, and while the court must act within the bounds of the statute and without intruding upon the administrative province, *it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.*

Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939) (emphasis supplied). There is no question that, having found the Board's failure to conduct a hearing to be arbitrary and improper, the Second Circuit was correct in denying ICFA's request that the order be enforced. As this Court has stated: "Courts [of appeals] must, of course, set aside Board decisions which rest on an 'erroneous legal foundation.' " *NLRB v. Brown*, 380 U.S. 278, 292

—*Footnote continued from preceding page*

therefore, be inappropriate. Third, if Respondent has correctly assumed that Petitioner intended to persuade this Court that the remedy question is one warranting review on certiorari, the petition is devoid of any discussion of law or fact supporting the view that the Second Circuit abused its discretion by not granting a remand. With due respect to counsel for the Petitioner, the request for remand is so worded as to leave unidentified the referenced-to "prior decisions of this Court," the "issues" raised herein, and the nature of the questions it seeks to have "reconsidered" or subjected to "further proceedings." (Petition, at 25).

(1965); *see also, Trustees of Boston University v. NLRB*, ____U.S.____, 48 U.S.L.W. 3568 (March 4, 1980).

With regard to the question of remand, the Second Circuit was not bound to deem it the appropriate remedy. *See NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 709 (7th Cir. 1976). In rejecting remand, the Second Circuit focused on the equitable factors present in this case.

First, the Board had the opportunity to address the issue of faculty status when the College requested reconsideration in light of the Second Circuit's *Yeshiva* decision. Only the Board's refusal to consider the issue at that relatively early stage of the representation proceedings forced the College to seek court review by way of unfair labor practice proceedings. The Board's subsequent change of heart, in light of this Court's affirmance in *Yeshiva*, came too late to justify a remand to do what properly should have been done on the College's motion for reconsideration. (Appendix A, at A-12). *See NLRB v. Colonial New Haven Nursing Home*, 542 F.2d at 710-11.

Second, ICFA, whose interests the court noted were "primarily at stake" in these proceedings, at no time sought a remand of the case to the Board. ICFA was absolute in its position below: neither the Second Circuit's nor this Court's *Yeshiva* decisions had any bearing on the case. By its request for alternative relief in this petition, ICFA appears to urge this Court to grant review of the Second Circuit's denial of a remedy that ICFA chose not to seek below. ICFA's request for remand at this late stage cannot alter the fact that it never took the position before the Second Circuit that remand was appropriate to protect its interests.

Third, the Board's arbitrary and improper refusal to grant a hearing "has exposed the College to needless expense and unwarranted prejudicial publicity."[17] (Appendix A, at A-12). The

[17]In its supplemental brief to the Second Circuit on the remedy issue, the College submitted for the Second Circuit's review numerous newspaper articles and editorials disseminated in Ithaca, New York and surrounding communities.

Second Circuit was keenly aware of the prejudice to the College that the Board's single-minded and improper refusal to grant a hearing had caused and which a remand would perpetuate.

The Board flouted the law of the Second Circuit, impervious to the impact of its decision on the College. While notions of administrative convenience and independence may have been sufficient justification from the Board's perspective, adherence to the nonacquiesence policy caused the College to suffer severe and widely publicized criticism. The College's repeated attempts to force compliance with the law of the Second Circuit were viewed, because of frequent mischaracterizations, as efforts to avoid legal obligations. The integrity and credibility of the College were impeached at the hands of the Board and with the expected encouragement of ICFA. The reality of the Board's failure to abide by the controlling law was unrecognized or, at least, overlooked. Instead, community attention was focused on the College's efforts to force the Board to recognize the law. The community, within which the College sits as an institution responsible for instilling moral and civil values of the highest order, viewed the institution as a law breaker.

All of this came as a direct result of the Board's adherence to its nonacquiescence policy, the basic tenet of which is that the NLRB need not follow the law of the federal circuit courts of appeals.

The Second Circuit recognized that remand would not be justified in light of these factors. The court did not, however, consider these factors to the exclusion of the interests of ICFA. The denial of remand did not impair ICFA's right to file a new representation petition with the Regional Director. A new petition, which ICFA has in fact filed while this case is pending before the Court, was astutely recognized by the Second Circuit as being preferable to a remand for rehearing. On remand, the required "showing of interest" would have been that which had been obtained in 1977 – an undesirable state of affairs given the

lapse of time and change of faculty personnel at the College. (Appendix A, at A-12).

Having acted within the bounds of the statute and having appropriately considered the exigencies of the case, it is respectfully submitted that the Second Circuit has not abused its discretion[18] in denying a remand. Accordingly, Petitioner's request for a grant of certiorari to review the selection of remedy is not warranted.

POINT III

THE SECOND CIRCUIT PROPERLY DENIED REVIEW OF THE BOARD'S ORDER DENYING ATTORNEYS' FEES.

In its motion in support of the General Counsel's motion for summary judgment against the College for alleged section 8(a)(5) violations, Petitioner requested extraordinary relief in the nature of attorneys' fees for expenses incurred during the processing of the underlying representation and the unfair labor practice cases. (Petition, at 11). The Board, while affirming the denial of the College's various requests to have its *Yeshiva* claims considered, did not award attorneys' fees. (Appendix B, at B-5 n.5). The Second Circuit enforced the Board's order denying extraordinary relief.

Petitioner would have this Court grant review on the theory that, because the Board rejected the College's attempts to gain a

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[18]That the selection of remedy is within the discretion of the reviewing court is well established. *See NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 30 (1943). Of course, had the particular exigencies of this case been different, the Second Circuit might have preferred to remand the case to the Board. In *Trustees of Boston University v. NLRB*, No. 77-1143 (1st Cir. May 8, 1980), the First Circuit, not being faced with arbitrary and improper Board action of the variety evidenced here, remanded the case to the Board for consideration in light of *Yeshiva*. In *NLRB v. Catholic University of America*, No. 78-2297 (D.C. Cir. April 21, 1979), the District of Columbia Circuit found that "no useful purpose would be served by remanding the case . . . ."

Yeshiva hearing, the attempts must have been "patently frivolous." (Petition, at 22-24). This theory does not comport with the law.

The Second Circuit accurately stated that the Board's test in deciding whether or not attorneys' fees are appropriate is whether the defenses or claims interposed were "frivolous." *See Orion Corp.*, 210 N.L.R.B. 633 (1974), *enf'd*, 515 F.2d 81 (7th Cir. 1975). The Board has held that it is not a sufficient basis for awarding attorneys' fees that the defenses raised are "debatable" rather than patently frivolous, *Heck's Inc.*, 215 N.L.R.B. 142 (1974); *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972), *modified*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). This Court has recognized that the Board policy of not reimbursing litigants for the costs of confronting his adversary's "debatable" defenses is appropriate. *NLRB v. Food Store Employers Union, Local* 347, 417 U.S. 1, 8-9 (1974).

At the very least, the merits of the College's various attempts to have its *Yeshiva* claims litigated were "debatable." *Yeshiva* represented a dramatic change in the law. The Second Circuit's decision drastically changed the rules by which the Board was to assess the managerial status of faculty members of private colleges and universities. The Board was not willing to label the College's attempts at reconsideration in light of this dramatic change as frivolous, notwithstanding that the Board would not apply the law of the Second Circuit. Ultimately, the Second Circuit found the College's claims not just debatable, but persuasive.

Petitioner cannot fairly ignore the fact that the College's first request to have the new, and controlling, *Yeshiva* principles applied was made in advance of the run-off election. Only the Board's initial refusal to grant reconsideration at that early stage of the proceedings caused the College to persist in its attempts to secure a hearing on its *Yeshiva* claims. The costs of

litigation incurred by Petitioner are attributable in large part to the arbitrary and improper actions of the Board.

There can be no doubt that the existence of a dramatic change in the law, which prompted the College's *Yeshiva* claims, negates any assertion that the claims were "frivolous contentions not to preserve a defense but to further delay compliance with an earlier decision." *Orion Corp., supra.*

Petitioner's notion that Board denial of the defenses or claims must result in an award of extraordinary relief ignores the meaning of the "patently frivolous" test. The Board was consistent in the application of the test and did not exceed its authority or abuse its discretion in denying attorneys' fees. Accordingly, the Second Circuit's enforcement of the Board's denial does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the College respectfully submits that the Petition should be denied.

Dated: October 6, 1980

Respectfully submitted:

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Of Counsel:
William L. Bergan, Esq.

Appendices

APPENDIX 1
Letter, dated 2-10-78 and Stipulation, dated 2-23-78

NATIONAL LABOR RELATIONS BOARD
REGION 3
111 West Huron Street
Buffalo, New York 14202 Telephone (716) 846-4931

February 10, 1978

William L. Bergan, Esq.
Bond, Schoeneck & King
One Lincoln Center
Syracuse, New York 13202

AAUP Chapter, Ithaca College
Attn: Charles J. Snyder, Jr., Pres.
Dept. of Speech, Pathology & Audiology
Ithaca College
Ithaca, New York 14850

Paul Mayo, Field Repr.
N.Y.S. United Teachers
1 Chemung Canal Plaza
Elmira, New York 14901

Re: Ithaca College
Case No. 3-RC-7107

Gentlemen:

Pursuant to our conversations of February 9, 1978, enclosed is a Stipulation to include the Albert Einstein Medical Center full time faculty members in the bargaining unit in the Ithaca College election. These personnel will vote by mail ballot before the election date.

Please sign and date this Stipulation and return it to this office as soon as possible.

Very truly yours,

/s/ MARK A. BAUER
Board Agent

Enclosure
MAB:mas

APPENDIX 1
Letter, dated 2-10-78 and Stipulation, dated 2-23-78

STIPULATION

We the undersigned parties to the captioned case, hereby agree and stipulate that the Regional Director may amend the unit description set forth in his Decision and Direction of Election in the captioned case by also including in the bargaining unit employees of Ithaca College who are employed on a full time basis at Albert Einstein Medical Center in New York City.

Accordingly, it is agreed and stipulated by the parties hereto that the said unit description may be amended to read as follows:

> All full time faculty members employed by Ithaca College at its Ithaca, New York location and at the Albert Einstein Medical Center in New York City, but excluding all guards, confidential employees, part-time faculty, and supervisors as defined in the Act.

The undersigned parties do hereby also agree and stipulate that the inclusion in the unit of the said employees at Ithaca College who are employed at the Albert Einstein Medical Center shall not, in part or in whole, be grounds for objections to conduct affecting the results of the election, and we hereby agree and stipulate that the eligibility issues resolved herein are final and binding upon the parties.

ITHACA COLLEGE
(Employer)

BY Bond, Schoeneck & King Date 2/13/78
William L. Bergan

APPENDIX 1

Letter, dated 2-10-78 and Stipulation, dated 2-23-78

AAUP CHAPTER, ITHACA COLLEGE
(Name of Organization)

BY /s/ Charles J. Schneider Date 2/14/78

NEW YORK STATE UNITED TEACHERS OF
ITHACA COLLEGE FACULTY ASSOCIATION
(Name of other Organization)

BY /s/ Paul S. Mayo Date 2/14/78

Recommended:
Mark A. Bauer Date 2/23/78

Date approved 2-23-78

Thomas W. Seeler
Regional Director
National Labor Relations Board

Case No. 3-RC-7107

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

BOND, SCHOENECK & KING
ONE LINCOLN CENTER
SYRACUSE, NEW YORK 13202

August 24, 1978

Thomas W. Seeler,
Regional Director
Region Three
National Labor Relations Board
111 West Huron Street
Buffalo, New York 14202

Re: Ithaca College
Case No. 3-RC-7107

Dear Mr. Seeler:

We forward herewith, on behalf of the employer Ithaca College, a motion for rehearing in the captioned proceeding together with a memorandum of law in support of that motion. Under separate cover, by copy of this letter, the other parties to the proceeding and the Executive Secretary of the Board are also being served with a copy of the papers.

The motion for rehearing, or to reopen the record, is made at this time in light of the recent decision of the Court of Appeals for the Second Circuit in the matter of *National Labor Relations Board v. Yeshiva University,* Docket No. 77-4182, July 31, 1978.

After reviewing the Court of Appeal's decision and after intensive discussions with representatives of the College, it is apparent that faculty members of Ithaca College discharge responsibilities and possess authority in strikingly similar manner to the responsibilities and authority which the Court concluded made the Yeshiva faculty supervisory or managerial personnel.

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

Ithaca College is a private, non-profit educational corporation whose ultimate operation is vested in a self-perpetuating Board of Trustees. The chief executive officer of the College is the President, whose executive staff consists of a Provost, a Vice President for Student Affairs, a Vice President for Development, a Business Manager, and a Controller. A Dean is responsible for the affairs of each of the College's six schools: The School of Humanities and Sciences; the School of Business Administration; the School of Health, Physical Education and Recreation; the School of Music; the School of Communications and, the School of Allied Health Professions. With the exception of the School of Business Administration, which is relatively new and in its formative stages, the schools are organized into departments.

In addition to the familiar administrative structure outlined above, faculty members participate at all levels of administration in policy-making and decision-making by various methods. The principal involvement of faculty members is through a series of committees, at the department, school, and college level, but faculty members also participate in individual capacities as well. For example, two faculty members who sit on the Board of Trustees of the College already have been determined by the Board to be managerial or supervisory personnel and thus ineligible to vote. Also, department chairmen, who represent and act on behalf of their respective departments, are instrumental in managing the college's affairs on a day to day basis.

Committees at Ithaca College are of two types, permanent committees and *ad hoc* committees.

The permanent committee structure at the College is organized principally in two tiers, one tier at the school level and

the second at the College level. College level committees include the Faculty Tenure and Promotions Committee, the Academic Policies Committee, the Academic Calendar Committee, the Library Committee, the Traffic Policy Committee, the Honorary Degrees Committee, and the Data Processing Users Committee, among others.

Permanent committees at the school level include personnel committees, curriculum committees, admissions and academic standings committees, and governance committees. Faculty members are appointed to these committees usually from among a group of nominees selected by the appropriate faculty unit.

The affairs of the College are conducted by interaction between administrative personnel and the appropriate committees.

In the hiring of new faculty members, the faculty members of the department in conjunction with the department chairman conduct searches, interview candidates, and ultimately recommend an individual for appointment to the Dean. Such recommendations are invariably honored.

In cases of promotion and tenure, the department faculty in conjunction with the department chairman, initiate the process. The department chairman's recommendations for promotion and tenure are honored almost without exception at the school level. When the Dean receives a recommendation for promotion or tenure, the matter is referred to the school committee on promotion and tenure which reviews the case and makes a recommendation to the Dean. Again, almost without exception, the committee's recommendations are followed. The matter is then forwarded to the Provost who refers the file to the College Tenure and Promotions Committee which makes a recommendation, jointly with the Provost, to the President. The College-level Committee has made recommendations contrary to

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

a Dean's recommendations, and the Committee's actions have been sustained.

In matters of curriculum, admissions policy, academic standing, grading, and degree requirements, faculty committees develop new policy and set standards either at the school level or college level as the case may be. School committees may, and do, set standards for their school which are more stringent than college requirements. Committee decisions in these matters invariably are final. Because degree requirements are set by committee, the course offering in a particular school often is thereby determined. Committee decisions may even affect course content when syllabi are reviewed.

In governance matters, each school has a governance document, and a governance committee. At the college level, the Faculty Council, composed of faculty members, is responsible for governance. The Faculty Council has jurisdiction in the area of curriculum, grading, scholastic standing, degree requirements, grievance handling, and compensation policy. The areas of jurisdiction for the Faculty Council are paralleled for the school governance bodies.

The college also has made extensive use of *ad hoc* committees.

In conducting searches for new officers, faculty search committees invariably are appointed and make effective recommendations. Search committees are used when a new president, vice president, or dean is to be appointed. Typically the search committee will select from among the applicants two or three individuals, one of whom is ultimately appointed. Staffing of a search committee is done either by election or by appointment after consultation with the Faculty Council or other appropriate faculty group.

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

Academic reorganization of the College has twice been the subject of consideration for *ad hoc* committees. In 1976-1977 a Task Force on Academic Reorganization, staffed by faculty members, conducted an extensive and in-depth analysis of the College and made substantial recommendations having far-reaching implications for the College's future. The Task Force Report forms the basis for an academic reorganization of the College now underway. Similarly, in 1970, a Task Force on Long Range Planning conducted a study of the College and submitted a report which resulted in extensive academic reorganization of the College, including creation of new schools. Faculty members, who composed the Task Force, recommended these changes.

The department chairmen at Ithaca College, who are full-time faculty members with teaching responsibilities, play a significant role as representatives of the faculty members in their respective departments in dealings with the Dean of the school. In such matters as hiring, promotion and tenure, and non-renewal of faculty contracts of employment, department chairmen, in conjunction with the faculty members of the department, effectively recommend to the appropriate Dean action to be taken. Salary recommendations, also, are made by chairmen and followed by the Dean.

In addition to the foregoing, faculty members participate in policy and decision making regarding student discipline and conduct, traffic regulation, purchase of computer equipment and allocation of computer resources, and library acquisitions and policy.

The faculty members at Ithaca College are integral elements in the managerial structure of the College. Their participation is continuous from the department level to the Board of Trustees and it is not token participation, but active and effective with

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

far-reaching consequences for college policy and decision making. Although this letter sketches only the highlights, the College is prepared to adduce proof which will establish the role of the Ithaca College full-time faculty as supervisory or managerial personnel in light of the *Yeshiva* decision.

Very truly yours,

BOND, SCHOENECK & KING

By: /s/ WILLIAM L. BERGAN

WLB/wp
cc: Thomas W. Seeler
Regional Director, Region Three
National Labor Relations Board
111 West Huron Street
Buffalo, New York 14202

AAUP Chapter, Ithaca College
Department of Speech, Pathology
& Audiology
Ithaca College
Ithaca, New York 14850
Attention: Charles J. Snyder, Jr., President

Ithaca College Faculty Association
New York State United Teachers-AFT
1 Chemung Canal Plaza
Elmira, New York 14301
Attention: Paul Mayo, Field Representative

William Lubbers
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

MOTION FOR REHEARING

UNITED STATES OF AMERICA
BEFORE THE REGIONAL DIRECTOR OF
THE THIRD REGION OF THE
NATIONAL LABOR RELATIONS BOARD

ITHACA COLLEGE,

Employer

and

ITHACA COLLEGE CHAPTER AAUP,

Petitioner

and

ITHACA COLLEGE FACULTY ASSOCIATION,
NYSUT-AFT,

Intervenor.

Case No. 3—RC-7107

---

1. Ithaca College, the employer, by its attorney, Bond, Schoeneck & King, pursuant to Section 102.65 (3) of the Rules and Regulations of the National Labor Relations Board, because of an extraordinary circumstance, moves and requests that the regional director reopen the record or conduct a rehearing in this matter.

2. The "extraordinary circumstance" referred to in paragraph 1 is the decision of the United States Court of Appeals For the Second Circuit in *National Labor Relations Board v. Yeshiva University, et al,* (Docket No. 77-4182) decided on July 31, 1978, subsequent to the representation hearing and decision in this matter.

3. A hearing *de novo* is required inasmuch as all the faculty members found by the regional director to constitute the ap-

propriate unit in this matter are managerial and/or supervisory personnel upon application of the criteria set forth in the *Yeshiva* decision and are therefore not employees as defined by the National Labor Relations Act ("the Act").

4. The prejudice that Ithaca College will suffer if this motion is denied is that it may be forced to bargain collectively with a union representing faculty members not covered by the Act.

5. The evidence to be adduced at the new hearing is material and will demonstrate that the faculty members of Ithaca College are supervisory or managerial employees under the *Yeshiva* criteria and therefore not employees within the Act.

6. This evidence was not adduced at the original hearing because of longstanding precedent which has been changed by the *Yeshiva* decision.

7. If adduced and credited, the evidence will require a dismissal of the petition in this matter.

Dated: August 22, 1978.

Respectfully submitted,

BOND, SCHOENECK & KING

By: /s/ WILLIAM L. BERGAN
William L. Bergan,
A Partner
Office and P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

APPENDIX 2
Letter and Motion for Rehearing, dated 8-24-78

TO: THOMAS W. SEELER
Regional Director, Region Three
National Labor Relations Board
111 West Huron Street
Buffalo, New York 14202

AAUP CHAPTER, ITHACA COLLEGE
Department of Speech, Pathology
& Audiology
Ithaca College
Ithaca, New York 14850
Attention: Charles J. Snyder, Jr., President

ITHACA COLLEGE FACULTY ASSOCIATION
NEW YORK STATE UNITED TEACHERS-AFT
1 Chemung Canal Plaza
Elmira, New York 14301
Attention: Paul Mayo, Field Representative

WILLIAM LUBBERS
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

DR. FRANK FALCONE
Ithaca College
Ithaca, New York 14850

WALTER W. WIGGINS
General Counsel
Ithaca College
308 N. Tioga
Ithaca, New York 14850

APPENDIX 2

Letter and Motion for Rehearing, dated 8-24-78

CERTIFICATE OF SERVICE

I certify that on August 24, 1978, I have caused to be served by certified mail, return receipt requested, a copy of the Motion for Rehearing and the Memorandum in Support of said Motion for Rehearing in Case No. 3-RC-7107.

CERTIFIED MAIL NO.	ADDRESSEE
137717	Thomas W. Seeler Regional Director Region Three National Labor Relations Board
137718	William Lubbers Executive Secretary National Labor Relations Board 1717 Pennsylvania Avenue, N.W. Washington, D.C. 20570
137719	AAUP Chapter, Ithaca College Department of Speech, Pathology and Audiology Ithaca College Ithaca, New York 14850 Attention: Charles J. Snyder, Jr., President
137720	Ithaca College Faculty Association — NYSUT-AFT 1 Chemung Canal Plaza Elmira, New York 14301 Attention: Paul Mayo, Field Representative

/s/ ROBERT D. ESSIG
Robert D. Essig
Bond, Schoeneck & King
One Lincoln Center
Syracuse, New York 13202

Dated at Syracuse, New York
this 24th day of August, 1978.

APPENDIX 2
Regional Director's Denial of Motion

August 25, 1978

William L. Bergan, Esq.
Bond, Schoeneck & King
One Lincoln Center
Syracuse, New York 13202

Re: Ithaca College
Case No. 3-RC-7107

Dear Mr. Bergan:

This acknowledges your letter of August 24, 1978 enclosing a "Motion For Rehearing" and a Memorandum of Law in support of your motion. In essence you seek a rehearing or the reopening of the record in this matter in light of the decision of the Court of Appeals for the Second Circuit in *N.L.R.B.* v. *Yeshiva University* issued on July 31, 1978. As you know the initial election in the above-numbered case has already been conducted pursuant to the Regional Director's Decision and Direction of Election and a run-off election is presently scheduled for September 29, 1978.

Your motion is denied. The Board may decide to petition the United States Supreme Court for a writ of certiorari to review the Second Circuit's decision in *Yeshiva*. In any case, whether the Board seeks review of this decision, or not, Regional Directors are bound to follow and apply Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce in the decision of the Court of Appeals. For these reasons your motion is denied.

Very truly yours,

THOMAS W. SEELER
Regional Director

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
THIRD REGION

ITHACA COLLEGE,

Employer

and

ITHACA COLLEGE CHAPTER AAUP,

Petitioner

and

ITHACA COLLEGE FACULTY ASSOCIATION, NYSUT-AFT,

Intervenor.

Case No. 3-RC-7107

---

1. The Employer, Ithaca College, by its attorneys, Bond, Schoeneck & King, hereby requests review by the National Labor Relations Board of the Decision issued by the Regional Director for the Third Region on August 25, 1978 denying the Employer's motion for a rehearing in the captioned proceeding.

2. The basis for this request for review is made pursuant to Section 102.67(c)(1) and (4) of the Board Rules and Regulations.

3. The motion for a rehearing was made pursuant to Section 102.65(e) of the Board Rules and Regulations on the ground that

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

a rehearing was required because of the existence of extraordinary circumstances, namely, the decision of the United States Court of Appeals For the Second Circuit in *National Labor Relations Board v. Yeshiva University, et al,* (Docket No. 77-4182, decided July 31, 1978).

4. The *Yeshiva* case was decided subsequent to the representation hearing and the direction of an election in this proceeding.

5. A hearing *de novo* is required inasmuch as all the faculty members found by the Regional Director to constitute the appropriate unit in the matter are managerial and/or supervisory personnel under the criteria set forth in the *Yeshiva* decision and, therefore, are not employees as defined by the National Labor Relations Act.

6. The evidence to be adduced at the new hearing is material and will demonstrate that the faculty members of Ithaca College are supervisory or managerial employees under the *Yeshiva* criteria and are not employees within the Act.

7. This evidence was not adduced at the original hearing because of longstanding Board precedent which has now been seriously challenged by the *Yeshiva* decision.

8. The *Yeshiva* decision raises a substantial question of law regarding prior Board precedent.

9. The *Yeshiva* decision presents a compelling reason for the Board to reconsider its former policy regarding college faculty.

10. The covering letter sent to the Regional Director and a Memorandum of Law are submitted with this Request for

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

Review to provide the facts and precedent upon which the Employer relies.

Dated: August 30, 1978
at Syracuse, New York

Respectfully submitted,

BOND, SCHOENECK & KING

By: WILLIAM L. BERGAN
William L. Bergan, a Partner
Office and P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

TO: WILLIAM LUBBERS
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

THOMAS W. SEELER
Regional Director, Region Three
National Labor Relations Board
111 West Huron Street
Buffalo, New York 14202

AAUP CHAPTER, ITHACA COLLEGE
Department of Speech, Pathology
& Audiology
Ithaca College
Ithaca, New York 14850
Attention: Charles J. Snyder, Jr.
President

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

ITHACA COLLEGE FACULTY ASSOCIATION
NEW YORK STATE UNITED TEACHERS-AFT
1 Chemung Canal Plaza
Elmira, New York 14301
Attention: Paul Mayo, Field Representative

CERTIFICATION OF SERVICE

I certify that on August 30, 1978 I caused to be served by certified mail — return receipt requested, a copy of a Request For Review of a Regional Director's Decision, and the Memorandum in Support of said Request for Review in Case No. 3-RC-7107 upon the following:

CERTIFIED MAIL NO.	**ADDRESSEE**
137221	William Lubbers Executive Secretary National Labor Relations Board 1717 Pennsylvania Avenue, N.W. Washington, D.C. 20570
137722	Thomas W. Seeler Regional Director, Region Three National Labor Relations Board 111 West Huron Street Buffalo, New York 14202
137723	AAUP Chapter, Ithaca College Department of Speech, Pathology & Audiology Ithaca College Ithaca, New York 14850 Attention: Charles J. Snyder, Jr., President

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

137724

Ithaca College Faculty Association
New York State United Teachers-AFT
1 Chemung Canal Plaza
Elmira, New York 14301
Attention: Paul Mayo,
Field Representative

/s/ ROBERT D. ESSIG
Robert D. Essig
BOND, SCHOENECK & KING
ONE LINCOLN CENTER
SYRACUSE, NEW YORK 13202

Dated at Syracuse, New York
this 30th day of August, 1978.

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

MEMORANDUM OF LAW IN SUPPORT OF REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD, THIRD REGION

ITHACA COLLEGE,

Employer

and

ITHACA COLLEGE CHAPTER AAUP,

Petitioner,

and

ITHACA COLLEGE FACULTY ASSOC., NYSUT-AFT,

Intervenor.

Case No. 3—RC-7107

Submitted by:

BOND, SCHOENECK & KING
Attorneys for Ithaca College
Office and P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

Of Counsel:
William L. Bergan

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

FACTS

Pursuant to the filing of a representation petition by the Ithaca College Chapter of the American Association of University Professors, a hearing was held in January, 1978. Prior to the hearing, Ithaca College Faculty Association, NYSUT-AFT, had been granted intervenor status. In a decision dated February 3, 1978 the Regional Director of Region Three concluded that "all full time faculty members employed by Ithaca College at its Ithaca, New York location but excluding all guards, confidential employees, part time faculty, and supervisors" constituted the appropriate unit. No request for the Board to review that determination was filed.

Because of the Board's longstanding precedent that University and College faculty members are "employees" (i.e., do not occupy supervisory or managerial status) within the meaning of the National Labor Relations Act ("the Act")[1] the College believed that to raise an issue pertaining to the managerial status of its faculty members would be a futile gesture which could be construed as a dilatory tactic.

In accordance with the regional director's decision, an election in the matter was held. However, as a majority was not obtained by any of the parties to that election, a run-off election between "no union" and Ithaca College Faculty Assoc., NYSUT-AFT, has been scheduled for September 29, 1978.

Subsequent to the hearing, the Regional Director's decision, and the first election in this matter, the United States Court of

---

[1]See *C.W. Post Center of Long Island University*, 180 N.L.R.B. 904 (1971); *Fordham University*, 193 N.L.R.B. 134 (1971); *University of Miami*, 213 N.L.R.B. (1974); and *Northwestern University*, 218 N.L.R.B. 247 (1975).

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

Appeals for the Second Circuit, in *National Labor Relations Board v. Yeshiva University,* ____ F.2d ____ (Docket No. 77-4182, decided July 31, 1978) held that the full time faculty at Yeshiva University had managerial status and that the "rigid criteria" utilized in the past by the Board in holding faculty members within the Act were "unjustified" and "arbitrary".

It is Ithaca College's position that it should have the opportunity to adduce evidence at a rehearing which will demonstrate that its faculty members are managerial employees under the criteria set forth in the *Yeshiva* decision.

By motion dated August 22, 1978, and mailed August 24, 1978, Ithaca College requested the Regional Director to conduct a rehearing. That motion was denied by a letter dated August 25, 1978 (see Attachment 1).

POINT I

The regional director should have granted a rehearing in this matter.

Under Section 102.65(e) of the Rules and Regulations of the N.L.R.B.:

"(1) A party to a proceeding may, *because of extraordinary circumstances,* move after the close of a hearing for reopening of the record, or move after the decision for reconsideration or rehearing . . . A motion for rehearing shall specify the error . . . alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error . . .

(2) Any motion pursuant to this subsection shall be filed within 10 days, or such further period as may be allowed . . ." (emphasis added)

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

The above rule is similar to certain language in section 10(e) of the Act which provides, in pertinent part:

> "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, *unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.* . . . If either party shall apply to the court to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board . . . the court may order such additional evidence to be taken before the Board . . ." (emphasis added)

Thus, under both the Act and the Rules and Regulations of the Board, a party to the proceeding will be given the opportunity to adduce additional evidence where its failure to do so at the original hearing can be satisfactorily justified because of "extraordinary circumstances".

Accordingly, the issue arises as to whether or not extraordinary circumstances are present here justifying Ithaca College's failure to adduce the evidence at the original hearing. More specifically, does a change in a significant and long-standing Board precedent satisfy the "extraordinary circumstances" test? There is authority which clearly demonstrates that a significant change in case law or Board precedent does justify the holding of a rehearing. *NLRB v. Lundy Manufacturing Corp.*, 286 F.2d 424 (2nd Cir. 1960); *Saratoga Harness Racing Assoc., Inc. v. New York State Labor Relations Board*, 6 A.D.2d 329, 177 N.Y.S.2d 401 (3rd Dept. 1958).

In *NLRB v. Lundy Manufacturing Corp., supra*, the Board adopted the findings of its Examiner and held the employer had committed an unfair labor practice. In doing so the Board

considered events which antedated the charges by more than 6 months. In reaching that conclusion the Board relied upon *Bryan Manufacturing Company,* 119 NLRB 502, enforced 264 F.2d 575. After the Board decision in *Lundy,* the *Bryan Manufacturing* case was reversed by the Supreme Court. Thereafter the Board contended that the employer in *Lundy* was precluded from seeking to avail itself of the reversal because of the alleged failure of the employer to urge that point before the Board. The Second Circuit held:

> "[I]t is not fatal that respondent did not include among its arguments a specific criticism necessarily futile at that stage, of a pertinent Board decision which had been enforced by a Court of Appeals. . . . Moreover, even if nothing had been said, the case would surely be one where 'the failure or neglect to urge such objection shall be excused because of extraordinary circumstances,' §10(e), 29 U.S.C.A. §160(e)." 286 F.2d at 426.

Similarly, in *Saratoga Harness Racing Assoc., Inc., supra,* the court considered §707(2) of the New York Labor Law which contains the same language as that of §10(e) of the National Labor Relations Act which has been cited above. There the court noted that the decision of the New York Board sustained charges against the employer of unfair labor practices which "indisputably" constituted violation of both the New York and National Labor Relations Acts. Nevertheless, the court held that subsequent to the New York Board's decision, the Supreme Court rendered a decision material to whether the New York Board had jurisdiction over the matter. Although the employer had not raised the issue of jurisdiction either before the Board or before the lower court, the appellate court remanded the case to the Board to permit development of the record on the issue of jurisdiction. The court stated:

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

> "The circumstances [i.e., the change in precedent] seem to us sufficiently "extraordinary", within the meaning of the statute, to excuse appellant's failure to interpose a jurisdictional objection which, in the state of the decisional law and the State Board's practice prior to Guss, would in all likelihood have been futile." 177 N.Y.S.2d at 403

Similarly, in view of the Board's longstanding precedent as enunciated in *C.W. Post Center of Long Island University, supra,* and as reiterated in *Fordham University, supra, University of Miami, supra,* and *Northwestern University, supra,* "in all likelihood (it would) have been futile" for Ithaca College to contend at the original hearing that its faculty employees were managerial or supervisory personnel and therefore not covered by the Act.

At the rehearing, the College will adduce evidence which will demonstrate that its faculty, under the *Yeshiva* tests, are managerial or supervisory personnel not covered by the Act, and that the Board therefore lacks subject matter jurisdiction of this matter.

As a result of the Regional Director's refusal to conduct a rehearing, the employer is forced to consider the unattractive alternative of challenging each ballot of the more than 250 voters on the ground that he or she is a supervisor or managerial employee under the *Yeshiva* criteria. If the motion for a rehearing would have been granted, the need to resort to such a cumbersome procedure would have been obviated. To proceed by way of one rehearing rather than by 250 separate challenges and determinations will reduce the potential delay of having this issue resolved.

APPENDIX 2
Request for Review of Regional Director's Decision with Memorandum of Law attached

POINT II

Compelling reasons exist to justify the Board to grant this Request For Review.

As noted earlier at page 4, prior to the *Yeshiva* decision, the Board consistently ruled that university and college faculty members were employees covered by the Act. However, the Court in *Yeshiva* reversed this longstanding Board policy, and held that on the facts in that case, the faculty members were not covered by the Act. Therefore, there is presently an absence of binding Board precedent on this issue. There is also a compelling reason for the Board to reconsider its former policy.

CONCLUSION

The motion for a rehearing should be granted. Extraordinary circumstances exist which justify Ithaca College's failure to adduce evidence at the original hearing on the issue of the supervisory or managerial status of its full time faculty. To proceed by any other method will cause inordinate delay to the detriment of the parties hereto and to the Board.

Dated: August 30, 1978

Respectfully submitted,
BOND, SCHOENECK & KING
By: WILLIAM L. BERGAN
William L. Bergan
A Partner
Office and P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

APPENDIX 2
NLRB's Denial of Request for Review

[57134 EVDAE

154157 R 0-14-01-017413
RAAUIJHZ RUEVDEL0013 2701625-UUUU-RUEVDAE.
NLRB
FM MARIO LAURO JR ASSOC EXEC SECY NLRB WSH DC

TO RUEVDAE/3/ROBERT ESSIG ESQ WILLIAM BERGAN ESQ BOND SCHONECK AND KING ONE LINCOLN CENTER SYRACUSE NY 13202

BT
SUS DUPE
RE ITHACA COLLEGE 3 RC 7107 EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DENIAL OF ITS MOTION FOR REHEARING IS HEREBY DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD : DATED SEPT. 26, 1978
BT

• • • MESSAGE TELEPHONED OR DELIVERED BY
C.Z. DATE: 9/27/78 TIME 1:20
• • •

TELEPHONED/DELIVERED BY: LMS

NNNN
[57134 EVDAE

APPENDIX 3
Letter Withdrawing Voters' Eligibility List, dated 9-15-78

BOND, SCHOENECK & KING
ONE LINCOLN CENTER
SYRACUSE, NEW YORK 13202

September 15, 1978

Mr. Thomas W. Seeler,
Regional Director
National Labor Relations Board
Region 3
111 West Huron Street
Buffalo, New York 14202

Re: Ithaca College
Case No. 3-RC-7107

Dear Mr. Seeler:

As counsel for Ithaca College we wish to notify you that the Excelsior list previously submitted in the captioned matter is hereby withdrawn. This letter shall constitute the withdrawal document.

The basis for the withdrawal of the Excelsior list is that there are no faculty members who are eligible to vote in the election scheduled for September 29, inasmuch as the Ithaca College full time faculty members occupy supervisory or managerial status upon application of the standards described in the Second Circuit's decision in *NLRB v. Yeshiva University.*

Sincerely,

BOND, SCHOENECK & KING

By: W L BERGAN
William L. Bergan

WLB/KEM

cc: Mr. Frank Falcone

APPENDIX 4
Challenge to Voters' Eligibility

CHALLENGE TO VOTERS' ELIGIBILITY

UNITED STATES OF AMERICA
BEFORE THE REGIONAL DIRECTOR OF
THE THIRD REGION OF THE
NATIONAL LABOR RELATIONS BOARD

ITHACA COLLEGE,

Employer,

and

ITHACA COLLEGE CHAPTER AAUP,

Petitioner,

and

ITHACA COLLEGE FACULTY ASSOCIATION,
NYSUT-AFT,

Intervenor.

Case No. 3-RC-7107

TO THE NATIONAL LABOR RELATIONS BOARD:

Ithaca College hereby challenges the voting eligibility of each person whose name appears on the attached list, on the grounds that each such person is a manager or supervisor.

More specifically, according to the criteria established in the Yeshiva University decision (2d Circuit Court of Appeals, July 31, 1978), each person on the annexed list is a manager or supervisor within the meaning of the National Labor Relations Act. Further, it is the opinion of Ithaca College that these persons are not listed on any Excelsior list, because the College

APPENDIX 4
Challenge to Voters' Eligibility

has withdrawn the Excelsior list and has notified the Board of the withdrawal.

BOND, SCHOENECK & KING
Attorneys for Employer,
Ithaca College
Office & P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

APPENDIX 5
Exceptions to Regional Director's Report on Objections and Challenges

EXCEPTIONS TO REGIONAL DIRECTOR REPORT ON OBJECTIONS AND CHALLENGES

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

ITHACA COLLEGE,

Employer

and

ITHACA COLLEGE CHAPTER AAUP,

Petitioner

Case No. 3-RC-7107

Ithaca College, by its attorneys, Bond, Schoeneck & King, takes the following exceptions to the Regional Director's Report on Objections and Challenges:

I. *The investigation was woefully incomplete and inadequate and the report contains gross factual errors which invalidate the conclusions and recommendations.*

The Regional Director characterizes the investigation of the objections and challenges as "full and complete," but, in fact, the investigation was conducted haphazardly and incompletely resulting in numerous misstatements of fact in the Report. The Report is so tainted with errors that the conclusions and recommendations resulting therefrom constitute a denial of due process.

Throughout the course of the investigation the Regional Director did not see fit to interview or otherwise take a

APPENDIX 5
Exceptions to Regional Director's Report on Objections and Challenges

statement from *a single representative of the College*, although College officials were available to meet with the Regional Director's representatives. (Falcone Affidavit ¶5; Ex. I(I)).* It is not surprising, in view of this deficient investigation, that the Report is replete with misstatements of fact and unwarranted assumptions of fact. These errors are a shaky, indeed inadequate, foundation for the Regional Director's conclusions and recommendations. The general, overall inadequacy of the Report, notwithstanding the specific exceptions stated below, requires the Board to reject the Report in its entirety, just as the Employer takes exception to the Report in its entirety.

The misstatements of fact contained in the Report are listed immediately below, without elaboration on the particular legal significance of the errors:

a. The Regional Director states that the Petitioner filed timely objections on March 9 to the original election, held on March 3, 1978, and that a full and complete investigation of the objections and challenges was conducted. In fact, the Regional Director's Report on Objections concluded that the objections were not timely. (Ex. II(E)). Although the objections had been filed in the Regional Director's office in a timely manner, they were not *served* on the other parties in timely fashion and accordingly, the objections were overruled.

b. The Regional Director states that the Employer sought to challenge each and every voter by handing a challenge letter to the Board Agent on election day stating that under the *Yeshiva University* decision they were all managerial or supervisory employees. The inference which the Report would have a reader

*References are to exhibits contained in the Appendix of Exhibits to the College's Exceptions.

draw is that the College attempted to confuse and disrupt the election at the last instant by proffering its letter of challenge. In fact, the College's attorney had a telephone conversation with the Board Agent who was in charge of the election approximately three days prior to the election and advised him that the College intended to proceed in this fashion. (Bergan Affidavit, ¶6).

c. The Report states that the Board has considered the College's contentions with regard to the supervisory or managerial status of faculty members and has rejected them.

In fact, neither the Regional Director nor the Board has ever addressed the *merits* of the College's contention. The Employer's objective beginning with its motion for rehearing filed with the Regional Director on August 24, 1978 was *to have the opportunity to adduce proof* on the issues addressed by the *Yeshiva University* decision. The Regional Director, the Board and the courts rejected the Employer's attempts to present such proof prior to the runoff election. (Exs. IV and V). The Board, thus, never rejected the *merits* of the Employer's contentions, but rather rejected only the Employer's contention that it should have the opportunity to present proof to the Board before the election was held.

d. The Regional Director stated in the original Report that the Employer sought to have the election as soon after the opening of the fall term as possible. The initial Report was corrected by an Errata issued November 13, 1978, which revised the Report to state that the Employer had sought to have the election in October and the Intervenor sought to have the election as soon after the opening of the fall term as possible. In

fact, the Regional Director's Report is inaccurate in both its original and "corrected" versions.*

The College consistently sought to have the election during the last week in September, while the Intervenor advised the NLRB that it desired the election *no earlier than the second week in October.* (Falcone Affidavit, ¶22).

e. The Report states that "[i]t was specifically agreed that the Employer would send to the Regional office a list of those persons who needed mail ballots in time for the ballots to be mailed no later than September 12."

Although there were telephone conversations between the Board and College representatives, there was no specific agreement for handling the request for mail ballots. (Falcone Affidavit, ¶'s 14 and 15).

Unlike the procedure followed for the original March election, where the Board provided the parties with timely written notice in the form of a letter dated February 10, 1978, regarding mail-ballot procedures, the Board did not provide the College with timely written mail ballot instructions for the runoff election. (Ex. II(B)). Acting Provost, Frank Falcone, was advised by a Board Agent, who was not familiar with the file, that the mail ballot list should be submitted as soon as possible. (Falcone Affidavit, ¶14). However, the College did not receive written instructions from the Board until it received the Supplemental Notice attached to the Notice of Election, which was transmitted

*The second amendment contained in the Errata dated November 13 further demonstrates the lack of attention to detail which is characteristic of the entire Report. The Regional Director initially stated that Employer's objection 4 was untimely, but then apparently remembered that it was telecopied to, and received by, the Regional Office on time.

by a letter dated September 12, 1978 (Ex. I(A)(1)), *the very date* the Supplemental Notice of Election stated was the last date on which the Regional office would mail the ballots to mail-ballot voters.

f. The Regional Director's Report concludes that the "normal" procedures in the dispatch and receipt of the mail ballots "were carefully observed." This conclusion is untenable in light of the fact that the Employer received written notification from the Board of when the mail ballots would be mailed only *after the mail ballots had in fact been dispatched by the Board.*

g. The Regional Director's Report *"presumes"* that the Notice of Election was posted at the Albert Einstein Medical Center, and states that the faculty members located at the Albert Einstein Medical Center were aware of the mail-ballot procedure because they voted in the first election.

The Employer posted the Notice of Election throughout its establishment at Ithaca, New York in conformity with the directions from the Regional Director. The Albert Einstein Medical Center, however, is not an establishment of Ithaca College and, in fact, no notices were posted there. The Albert Einstein Medical Center is located at the Jacobi Hospital in New York City, a separate and distinct entity from Ithaca College. The Regional Director's presumption is in error and the presumption was unnecessary because the College could have advised the Regional office of what did occur if inquiry had only been made. (Falcone Affidavit, ¶16).

In addition, the Report concludes that the voters at the Medical Center *were aware of the mail-ballot procedures.* None of the four faculty members involved was interviewed by the Board to determine whether or not they were aware of the mail-

ballot procedure followed in September. The Board again assumes a fact with no basis whatsoever for the assumption. (Exs. I(J)(1), (2), (3), & (4)).

h. The Regional Director's Report states that of the *several* persons who appeared to vote whose names were not on the eligibility list, some were denied the opportunity to vote but others were later permitted to vote. In fact, the Board agents at the election in the morning indicated that any person who appeared to vote whose name was not on the *Excelsior* list *had the right* to vote and the Board agents were not authorized to deny that right; they could only insist that the vote be cast subject to challenge. *During the afternoon,* the Board agents reversed their positions, denying certain persons who appeared at the polling place the right to vote under challenge. (Metzger Affidavit, ¶6).

i. The Regional Director's Report states that ICFA is an *ad hoc* organization which was founded after the AAUP filed the petition in this case. In fact, the ICFA first became active in 1975 during the course of an earlier AAUP effort to become the certified representative of Ithaca College's faculty members. (Exs. III(C)(1), (2) & (3)).

j. The Regional Director's Report states that all dealings with the Board on behalf of ICFA have been through paid staff representatives of NYSUT.

In fact, Chester Galaska executed the Tally of Ballots dated March 3, 1978 and the Revised Tally of Ballots dated August 9, 1978 for ICFA-NYSUT. (Ex. III(D) (2) & (3)). In addition, Chester Galaska executed the Certification on Conduct of Election dated March 3, 1978 *as agent for* the ICFA in addition to his capacity as authorized observer. (Ex. III(D)(1)). Official Board documents

indicate that Galaska has repeatedly dealt directly with the Board.

Because the Regional Director's Report contains factual errors which are pervasive and of substantial magnitude, the Board should reject the Report in its entirety.

II. *The Regional Director erroneously recommends that the employer's objection 1(d) be overruled.*

Objection 1(d) states that:

> The Board erred, and violated its own procedures, in failing to supply written notice to the parties setting forth the time and date on which "mail in" ballots would be dispatched to the voters and the terminal time and date by which the ballots must be returned to the Regional Office.

The Regional Director's Report concludes that "the parties were fully apprised of the mail-balloting procedures prior to the mailing of the ballots" and that the Board was "following the procedure used in the original election . . . ."

In connection with the original election, the Employer received a timely written notice on or about February 11, 1978 advising the College of the procedure to be followed regarding mail ballots. (Ex. II(B)). This letter stated that mail ballots would be dispatched by the Region no later than February 14, 1978, which gave the College sufficient notice to ensure that faculty members away from Ithaca could be included in the request for mail ballots.

The Board sent no comparable written notice prior to the runoff election other than the supplemental Notice of Election which wasn't mailed from the Regional Office until September

12, 1978, the very date on which mail ballots were dispatched by the Region.

There were telephone conversations between the Board and College representatives, but these conversations did not result in a meeting of the minds as to the mail-ballot arrangements. (Falcone Affidavit, ¶ 15). The Regional Director erred in concluding that the College was fully apprised of the procedure to be followed. The Board's departure from the procedures mandated in its own Case Handling Manual for providing written notice to the parties requires that the election be set aside.

III. *The Regional Director erroneously recommends that the employee's objection 1(e) be overruled.*

Objection 1(e) states that:

> Certain members of the faculty deemed eligible by the Board were effectively disenfranchised by not receiving mail ballots.

The Regional Director's Report concedes only that the non-receipt of mail ballots by four faculty members at the Albert Einstein Medical Center in New York City was "unfortunate," but did not amount to disenfranchisement. This conclusion is unwarranted.

The Supplemental Notice of Election, issued by the Third Region, states, in part, that "all full time faculty who are stationed at the Albert Einstein Medical Center in New York City . . . *will* vote by mail ballot . . . ."

The Regional Director did not send timely written instructions to the Employer of the specific procedures to be followed in handling mail ballots for the September 29, 1978 runoff election,

although the Board did provide such written instructions for the original election held on March 3, 1978. The Regional Director attempts to shift responsibility for the disenfranchisement of the four faculty members to both the College and the faculty members themselves, while absolving the Regional Office of any responsibility.

Having conducted the initial election in March, the Regional Office was well aware that the Employer had faculty members in New York City who would require mail ballots. (Ex. II(A)(2); Ex. II(B); Ex. II(C); Ex. I(A)&(B)). There was a continuing responsibility on the part of the Regional Office to ensure that these faculty members received mail ballots. By not receiving mail ballots, the faculty members stationed at the Albert Einstein Medical Center were disenfranchised and the election should be set aside.

IV. *The Regional Director erroneously recommends that the employee's objection 1(f) be overruled.*

Objection 1(f) states that:

> The Board permitted certain faculty to vote under challenge while denying the same opportunity to other faculty.

The Regional Director's Report incredibly concludes that because certain challenged voters who were not full-time faculty members on the eligibility date were not eligible, other persons who sought to vote under challenge, but who were denied the opportunity, *"were similarly situated."* He concludes that denying them the right to vote under challenge did not result in disenfranchisement. *There is no basis for the Regional Director's conclusion that the persons denied a challenged ballot were similarly situated* because there was absolutely no investigation

to determine their status. If they had been permitted to vote under challenge, the matter could have been resolved following a proper investigation.

In addition the Regional Director does not explain why an arbitrary decision was made to deny challenged ballots to some individuals while allowing others to vote subject to challenge. Such patent, unexplained arbitrariness can only undermine confidence in the integrity of the Board's processes.

V. *The Regional Director erroneously recommends that the employer's objection 1(b) be overruled.*

Employer's Objection 1(b), in substance, charges that the Regional Director abused his discretion by not using a more recent eligibility date for the runoff election than the eligibility date for the March 3, 1978 election.

The Regional Director recommends that this objection be overruled because the Employer did not apply for a new eligibility date and because there has been no showing why an eligibility date closer to the second election was required.

The simple answer to why there had been no showing that an alternative eligibility date was necessary is that the Regional Director never sought any specific information concerning turnover from the College. The Report merely notes that there were 33 fewer names on the eligibility list for the September 29 runoff election. There was no inquiry as to the number of new full-time faculty members who commenced employment at the start of the 1978-1979 academic year. (Falcone Affidavit, ¶5).

The Regional Director's Decision and Direction of Election, dated February 3, 1978, notes that full-time faculty members must be given a full year's notice of termination if their con-

tracts are not to be renewed. (Ex. II(F)). Thus, any newly hired faculty members are employed for a minimum of two academic years. (Falcone Affidavit, ¶9). The Regional Director was not totally unaware of faculty employment and turnover patterns at educational institutions such as Ithaca College.

In addition to 27 full-time faculty members who left Ithaca College after the original election, 40 new full-time faculty members were appointed for the 1978-1979 academic year. (Falcone Affidavit, ¶'s 7, 8). These 40 individuals are vitally concerned with the outcome of this election and denying them the opportunity to vote by not establishing a new eligibility date is grounds for setting aside the election.

VI. *The Regional Director erroneously recommends that the employer's objection 2 be overruled.*

Objection 2 states that:

> Election observers for the Union occupied managerial or supervisory status.

The Regional Director's report states that the Board "has considered the Employer's contentions with regard to supervisory or managerial status of faculty members and has rejected them. . . ." Apparently this is the sole basis for recommending that objection 2 be overruled. The Board, however, has not ruled on the *merits* of the contentions but, rather, has ruled only that the Regional Director did not err when he denied the Employer's motion for a rehearing to adduce proof that faculty members occupy managerial or supervisory positions. (Ex. IV). Nowhere in the Report does the Regional Director deal specifically with the Employer's objection that the faculty members who served as union election observers were managerial or supervisory employees, even though the College was careful to select as ob-

servers only persons who clearly are non-supervisory, non-managerial and non-confidential *employees* under the Act.

VII. *The Regional Director erroneously recommends that employer's objection 3 be overruled.*

Employer's Objection 3 charges that a union representative misrepresented to a news reporter a statement made by an agent of the Regional Office.

The Regional Director concludes in the Report that the union official was not an agent of the ICFA and, in any event, the misrepresentation was not material. The Regional Director erred in both conclusions.

First, the individual who gave the statement to the press, Chester Galaska, has been a member of the ICFA Steering Committee since its inception in 1975. (Ex. III(C)). He has repeatedly been quoted as a spokesman for ICFA in the Ithaca newspapers and has appeared on local television speaking on behalf of ICFA. (Ex. III(E), (F) & (G); Falcone Affidavit, ¶21). In addition, he has executed official Board documents on behalf of ICFA. (Ex. III(C) (1) & (D)). Indeed, Chester Galaska, and his colleague Harvey Fireside, are the two individuals most directly associated with ICFA. (Falcone Affidavit, ¶18; Ex. III(B), (E), (F), (G) and (I)). In the eyes of the College administration, the Ithaca College faculty and the Ithaca community, Chester Galaska represents and speaks on behalf of ICFA. There can be no doubt that he is an agent for ICFA.

Furthermore, the misrepresentation was material. The Regional Director's September 8, 1978 letter states, in part, that "[N]o challenge to the ballots of . . .[faculty members whose names appear on the *Excelsior* list] will be accepted unless there is a positive showing that there has been a substantive change in

the status of the person challenged since the submission of the eligibility list on August 31, 1978." (Ex. I(D)).

Chester Galaska is quoted as saying in a September 28th (day before runoff election newspaper article) that "[o]n September 15, NLRB replied to Ithaca College that they could not challenge all the votes as this would be considered *'challenging frivolously'*." (Ex. III(A)). Galaska misstated the Regional Office in order to convince the eligible voters that the Board supported ICFA's contentions that the College was not asserting a legal position in good faith. No other inference reasonably follows from his quotation. The Regional Director's letter in no way suggests that the Employer was acting "frivolously."

By misrepresenting the Regional Director's statement in a publication widely circulated on the campus and throughout the Ithaca community, the union engaged in conduct affecting the election which requires that the election be set aside.

VIII. *The Regional Director erroneously recommends that objection 1(a) be overruled.*

Objection 1(a) states that:

> The Regional Director of Region 3 of the Board improperly rejected the Employer's withdrawal of the Excelsior list.

The Regional Director's Report dismisses this objection on the same basis as Objection 2, above. The report erroneously concludes that the Board had decided the merits of the Employer's contention that faculty members meet the *Yeshiva* managerial or supervisory criteria. The Regional Director has made no investigation whatsoever on the issue of whether or not Ithaca College faculty members are supervisory or managerial personnel.

APPENDIX 5
Exceptions to Regional Director's Report on Objections and Challenges

IX. *The Regional Director erroneously recommends that objection 1(c) be overuled.*

Objection 1(c) states that:

> Representatives of the Board supervising the election improperly refused to accept and even consider the Employer's challenges to the eligibility of full-time faculty members.

The Regional Director's rationale in rejecting Objection 1(c) is linked to his rationale regarding Objections 2 and 1(a) above. The Report implicitly concludes that the *Yeshiva* issues were completely litigated and adjudicated when the Employer's motion to reopen the hearing was denied and denial of the motion was sustained by the Board.

The issues were not litigated, and the Employer in good faith took this step to preserve its legal position. (Exs. IV & V). By refusing to accept the challenges, the Regional Director attempted to frustrate further the Employer's efforts to have the Board resolve the issue of the faculty's status.

X. *The Regional Director erroneously recommends that objection 4 be overruled.*

The Regional Director's Report concludes that objection 4 should be overruled because an inadvertent omission of one name from the Excelsior list was due to the Employer's neglect and the Employer would profit by its own neglect if this objection were sustained. The Employer does not seek to reap a profit as a result of neglect, but, rather, contends that a voter, whose vote was challenged in the original election and who was determined to be eligible to vote, remained eligible to vote, and was disenfranchised because his name was excluded from the list.

APPENDIX 5
Exceptions to Regional Director's Report on Objections and Challenges

XI. *The Regional Director erroneously recommends that the challenges to six faculty members be sustained.*

The Regional Director's Report concludes that the challenges to six faculty members should be sustained. This recommendation follows an incomplete and faulty investigation of the facts.

For example, Arthur E. McCue, a full-time faculty member of the College, was hired before the start of the 1977-1978 academic year with duties as Department Chairman of the Art Department and teaching duties. The Art Department had no other Chairman during the course of the 1977-78 academic year. Professor McCue alone was responsible for discharging departmental responsibilities of a full-time Chairman. The term "Chairman" denotes full-time responsibility for the Department. (Falcone Affidavit, ¶'s 23, 24).

The Regional Director's investigation would have uncovered such facts if it had been conducted with thoroughness.

XII. *The Regional Director erroneously recommends that the challenges to three votes not be resolved.*

The Regional Director's Report concluded that three challenges need not be resolved after sustaining six challenges. The tally of ballots resulted in only a slim seven vote margin for the Intervenor. Thus, the three votes are potentially crucial to the outcome of the election. An investigation would have revealed that these challenges are totally frivolous. The three voters were eligible to vote in the first election and were clearly eligible to vote in the runoff election since they remained full-

time faculty members on the date of the runoff election. (Falcone Affidavit, ¶'s 25-27).

Dated: November 28, 1978

Respectfully submitted,

BOND, SCHOENECK & KING
By: WILLIAM L. BERGAN
William L. Bergan
Attorneys for Employer
Office and P.O. Address
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 422-0121

APPENDIX 6
Election Petition, filed 9-5-80

Form NLRB-502 (11-64)
Form exempt under 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
PETITION

Case No. 3-RC-7896
Date Filed 9/5/80

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition *(If box RC, RM, or RD is checked and a charge under Section 8 (b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)*

X RC—CERTIFICATION OF REPRESENTATIVE – A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.

2. Name of Employer: Ithaca College.

Employer Representative to Contact: Dr. James Whalen.

Phone No.: 607-274-3011.

3. Address(es) of Establishment(s) involved *(Street and number, city, State and ZIP Code)*: Ithaca, New York, 14850.

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*: School.

APPENDIX 6
Election Petition, filed 9-5-80

5. Unit involved *(In UC petition: describe PRESENT bargaining unit and attach description of proposed clarification):* Included: All full-time faculty members. Excluded: All guards and supervisors as defined in the Act, and all other employees.

6a. Number of Employees in Unit: Approximately 280.

6b. Is this petition supported by 30% or more of the employees in the unit? X YES.

7a. Request for recognition as Bargaining Representative was made on (none made) and Employer declined recognition on or about _____ *(If no reply received, so state.)*

8. Recognized or Certified Bargaining Agent *(If there is none, so state):* None.

9. Date of Expiration of Current Contract, if any *(Show month, day and year):* None.

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Ithaca College Faculty Association/NYSUT/AFT
/s/ JOHN W. SCHARTZ, President
Ithaca College, Physics Dept.-Science Hall
Ithaca, NY 14850 Phone Number 607-274-3247

Willfully false statement on this petition can be punished by fine and imprisonment (U.S. Code, Title 18, Section 1001)

APPENDIX 6
Letter Holding Proceedings in Abeyance, dated 9-9-80

NATIONAL LABOR RELATIONS BOARD
REGION 3
111 West Huron Street
Buffalo, New York 14202

Telephone: (716) 846-4931

September 9, 1980

Ithaca College
Attn: Dr. James Whalen
Ithaca, New York 14850

William Bergan, Esq.
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Ithaca College Faculty Association/
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New York State United Teachers
One Chemung Canal Plaza
5th Floor
Elmira, New York 14901

Re: Ithaca College
CASE 3-RC-7896

APPENDIX 6

Letter Holding Proceedings in Abeyance, dated 9-9-80

Gentlemen:

This is to advise you that further proceedings in the above case will be held in abeyance until a ruling is issued on the Petitioner's petition to the Supreme Court for a writ of certiorari to the Second Circuit Court of Appeals' decision issued on May 19, 1980, dismissing the charges in Case 3-CA-8962.

Very truly yours,
/s/ THOMAS W. SEELER
Regional Director

Received: Sept 10, 1980

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